FILED
JUN 14 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1942

No. 948

ANTONIO STORNELLI

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

PETITION FOR REHEARING

T. Carl Nixon,
Attorney for Petitioner,
31 Exchange Street,
Rochester, New York.

Dated: June 11, 1943.

Casper V. Baltensperger, Rochester, N. Y.
Wendell J. Brown, Chicago, Ill.
Counsel.

Daily Record Company,
Rochester, New York.

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ANTONIO STORNELLI,

vs.

UNITED STATES GYPSUM COMPANY,
Petitioner.

PETITION FOR REHEARING

The above named petitioner, United States Gypsum Company, comes before this Court and presents its petition for a rehearing of the petition for certiorari in this case.

JURISDICTION

The petition for certiorari was filed April 21, 1943; and was denied on June 1, 1943. This petition is filed within twenty-five days after the date of denial, under Rule 33 of this Court. (28 U. S. C. A., Sec. 347.)

REASONS FOR PETITION FOR REHEARING

1. The principal question here, is whether Sec. 417 of the Labor Law of the State of New York created a liability by statute governed by a six year Statute of Limitations or whether an action brought because of a violation thereof is one grounded in negligence to which a three year Statute of Limitations applies. The Court below held that the action was one created by statute to which a six year Statute of Lim-

itations applied. The petitioner contended that such a holding is in conflict with decisions of the New York courts in respect to quite similar provisions of the New York Labor Law. (Petitioner's brief, Point II.)

There were no decisions in the New York courts *directly* on Sec. 417 at the time the petitioner's brief was filed, although the first step had been taken to obtain an eventual appellate court decision in a similar case by a pending motion in Special Term in the New York Supreme Court at Genesee County. *(Hegierski vs. United States Gypsum Company.)* This motion had not reached the stage of argument at the time the petitioner filed its brief, but had been argued and decided before the respondent prepared his brief.

The Special Term decided the motion in favor of the respondent, who stressed that decision heavily in his brief upon this petition. (Respondent's brief, pp. 13, 14, 15.) However, respondent did not advise this Court that the order based upon this decision had been appealed, and that it was hoped by petitioner that an authoritative decision of a New York appellate court would ultimately be obtained. The respondent did not serve his brief upon the petitioner's attorneys until June 4, 1943—three days after the petition for the certiorari had been denied by this Court, and thus the petitioner was deprived of its opportunity to so advise this Court by a reply brief. Respondent now cites this Special Term decision as "a complete answer to the argument of counsel for the defendant" (respondent's brief, p. 13) and claims that it is the law of New York State, and that this Court is bound to follow it.

The petitioner intended to file a reply brief when served with respondent's brief, to suggest that this Court hold its decision on the petition for a reasonable time until an opportunity had been had to argue the appeal in at least the Appellate Division of the Supreme Court, and now respect-

fully takes this opportunity to make that request. It should be feasible to argue this question at the September 1943 term of the New York Appellate Division in the Fourth Department.

This question is of great importance to this defendant and petitioner sincerely believes that there is at least a fair possibility that the appellate courts will uphold the petitioner's contention, in which case this Court may see fit to conform to that holding.

PUBLIC IMPORTANCE

The question here, is of public importance since the decision of the Circuit Court of Appeals—being the only decision of an appellate court on the statute—is likely to be followed by the lower courts not only in New York State, but in other states.

For the foregoing reasons petitioner respectfully urges that a rehearing be granted; that upon further consideration the order of June 1, 1943 denying the petition for certiorari be revoked; and that the decision on the writ be reasonably held to provide an opportunity for the appellate courts of New York State to hear the appeal above mentioned, and that the writ of certiorari issue.

Respectfully submitted,

T. CARL NIXON,
Attorney for Petitioner,
31 Exchange Street,
Rochester, New York.

Dated: June 10, 1943.

CASPER V. BALTENSPERGER, Rochester, N. Y.
WENDELL J. BROWN, Chicago, Ill.
Counsel.

I, E. Willoughby Middleton, counsel for the above named petitioner, United States Gypsum Company, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

E. WILLOUGHBY MIDDLETON,
Attorney and Counsel for Petitioner.